



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

Amanda S. La Forge, Esq.
Democratic National Committee
430 South Capitol Street, S.E.
Washington, D.C. 20003

NOV 25 2009

RE: MUR 6127
Democratic National Committee and
Andrew Tobias, in his official capacity as
Treasurer
Obama Victory Fund and
Andrew Tobias, in his official capacity as
Treasurer

Dear Ms. La Forge:

On November 10, 2008, the Federal Election Commission notified your clients, Democratic National Committee and Andrew Tobias, in his official capacity as Treasurer ("DNC"), and Obama Victory Fund and Andrew Tobias, in his official capacity as Treasurer ("OVF"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, as well as publicly available information, the Commission, on November 17, 2009, voted to dismiss the allegations that the DNC and OVF violated 2 U.S.C. § 41b(a). The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

You are advised that the confidentiality provisions of 2 U.S.C. § 437g(a)(2)(A) remain in effect, and that this matter is still open with respect to other respondents. The Commission will notify you when the entire file has been closed.

If you have any questions, please contact Jin Lee, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Julie Kara McConnell
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS: Obama Victory Fund
 Democratic National Committee**

MUR: 6127

I. INTRODUCTION

The Complaint in this matter alleges that VIDA Fitness ("VIDA"), a health club based in Washington, D.C., violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(b), (d) and (f) by facilitating the making of contributions and making prohibited contributions to the Obama Victory Fund ("OVF"), a joint fundraising committee comprised of Obama For America ("OFA") and the Democratic National Committee ("DNC"). The Complaint claims that VIDA facilitated the making of contributions by using a corporate email list to distribute OVF fundraising solicitations and allowing OVF to use VIDA's facilities for a fundraiser. Because VIDA allegedly never charged OVF for the use of the email list or the use of the space, the Complaint argues that VIDA made, and OVF knowingly accepted, prohibited corporate contributions. Based on the discussion below, the Commission dismisses the allegation that OVF and the DNC violated 2 U.S.C. § 441b(a) by knowingly accepting a prohibited contribution.

II. FACTUAL BACKGROUND

VIDA, a Subchapter S corporation, is a fitness club with three locations in Washington, D.C.¹ Response of VIDA Fitness ("VIDA Response"), Declaration of David von Storch ("von Storch Dec.") at ¶ 1. David von Storch is VIDA's sole shareholder and has been an active member of the Democratic Party. von Storch Dec. at ¶¶ 1-2. According to the VIDA Response, in mid-September 2008, Mr. von Storch and Tom Petrillo, a fundraiser for the DNC, spoke about

¹ See VIDA Fitness website, www.vidafitness.com.

1 holding a fundraising event on September 26, 2008 to benefit OVF. *Id.* at ¶ 3. Mr. von Storch
2 told Mr. Petrillo about empty space at VIDA's newest location, and they agreed to hold the event
3 at this location. *Id.* The VIDA Response and the Response of DNC and OVF ("DNC/OVF
4 Response") indicate that Mr. Petrillo informed Mr. von Storch that OVF would have to be
5 invoiced for the rental of the space as well as any food or beverages served at the event. *Id.*;
6 DNC/OVF Response, Declaration of Thomas Petrillo ("Petrillo Dec.") at ¶ 4.

7 Prior to September 19, 2008, Mr. Petrillo emailed Mr. von Storch an invitation to the
8 fundraiser. *See* OVF Invitation, attached as Exhibit A to DNC/OVF Response; von Storch Dec.
9 at ¶ 7. Mr. Petrillo also emailed this invitation to approximately 500 donors in the D.C.
10 metropolitan area. Petrillo Dec. at ¶ 5. According to Mr. von Storch, he revised the invitation,
11 without Mr. Petrillo's knowledge or approval, adding a special disclaimer stating, "VIDA and
12 Bang² do not endorse nor support any political candidate, but do encourage their members and
13 friends to get involved and participate in the electoral process." *See* VIDA Invitation, attached
14 as Exhibit B of VIDA Response; von Storch Dec. at ¶ 7. On his own accord and without the
15 knowledge or approval of Mr. Petrillo, Mr. von Storch then emailed this invitation to
16 approximately 20,000 individuals who were on a list, prepared by Mr. von Storch, of customers
17 and friends of VIDA and Bang. von Storch Dec. at ¶¶ 9, 10; Petrillo Dec. at ¶¶ 7-8. Mr. von
18 Storch states that he subsequently paid Vida \$3,000 as a "personal in-kind contribution" to the
19 OVF for the use and rental of the email list, calculated as "\$150[0].00 [sic] per 10,000 names."
20 von Storch Dec. at ¶ 10. The Commission's disclosure database indicates that Mr. von Storch
21 made a \$3,000 contribution to OVF on December 4, 2008.³

² Bang refers to Bang Salon and Spa, which is a salon owned by Mr. von Storch.

³ Although the contribution limit for individuals to a candidate committee during the 2008 election cycle was \$2,300, individuals could give a maximum contribution of \$28,500 to national party committees. *See* 2 U.S.C. § 441a(a). Because OVF was a joint fundraising committee in which OVF and the DNC were participants, an

1 On September 26, the day of the fundraiser, OVF brought in, at its own expense, the
2 equipment and volunteers to manage the event and guests, von Storch Dec. at ¶ 11, but it had not
3 received an invoice from VIDA for the use of the space and beverages. According to press
4 reports, more than 400 attended this event and tickets were "almost sold out" at \$250 to \$2,500.⁴
5 In addition, there were a limited number of tickets available at \$100. See VIDA Invitation.
6 Given that the gym was to open on the following Monday, von Storch reportedly promoted this
7 event a "sneak peak" into the new location.⁵ At this time, we do not have information as to how
8 much was raised or how much of the amount raised resulted from Mr. von Storch's invitations.

9 After the event, Mr. Petrillo claims that he asked Mr. von Storch for an invoice but did
10 not receive one immediately. Petrillo Dec. at ¶ 9. According to Mr. von Storch, because the
11 main celebrity attraction cancelled her appearance at the last minute, "[f]rustration and confusion
12 reigned, and invoicing for the rental space and beverages got lost in the shuffle." von Storch
13 Dec. at ¶ 11. Furthermore, Mr. von Storch became occupied with the grand opening of the new
14 VIDA location and did not realize that he forgot to submit the invoice to Mr. Petrillo. von Storch
15 Dec. at ¶ 12. Mr. Petrillo also was deployed to Ohio to conduct campaign work and did not
16 realize that he had not yet received an invoice. Petrillo Dec. at ¶ 12. When Mr. Petrillo learned
17 of the Complaint in this matter, he again asked Mr. von Storch for the invoice. Petrillo Dec. at ¶
18 11.

individual could make a contribution up to \$30,800. See 11 C.F.R. § 102.17(c)(5) (providing that a contributor could make a contribution to the joint fundraising effort in an amount that represents the total of the allowable contribution limits for all participants).

⁴ Ann Schroeder Mullins, *Sarah Jessica Parker in Town Tonight for Obama*, POLITICO, Sept. 26, 2008, http://www.politico.com/blogs/annschroeder/0908/Sarah_Jessica_in_town_tonight...

⁵ *Id.*; see also, Victor Maldonado, *Sarah Jessica Parker to Headline Obama Fundraiser in Washington*, Sept. 22, 2008, <http://www.namahouseblend.com/showDiary.do?diaryId=7130&view=print> (stating that the event would also celebrate the opening of VIDA's Metropole location).

1 On December 4, 2008, Mr. Petrillo received an invoice, dated November 26, 2008, from
2 Mr. von Storch for \$2,725.00. Petrillo Dec. at ¶ 12; VIDA invoice, attached as Exhibit C to
3 VIDA Response. Mr. von Storch stated that he charged \$2,500 for the space rental based upon
4 what he estimated a hotel would charge for the same amount of space used, given that the space
5 was new, and "there was no history of customary use, or usual and normal rental charge for, the
6 venue." VIDA Response at 4. In addition, Mr. von Storch charged \$225 for beverages that were
7 served at the event. von Storch Dec. at ¶ 12. OVF subsequently paid the invoice. See Check
8 No. 5560, attached as Exhibit D to VIDA Response.

9 **III. LEGAL ANALYSIS**

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11 A corporation is prohibited from making a contribution in connection with a federal
12 election under the Act. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). In addition, neither a
13 federal candidate nor a political committee may knowingly accept a contribution from a
14 corporation. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d). The Commission's regulations
15 further provide that a corporation may not facilitate the making of a contribution by using its
16 corporate resources to engage in fundraising activities for any federal election. See 11 C.F.R.
17 § 114.2(f)(1). The regulations provide examples of conduct that constitute corporate facilitation,
18 including the use of a corporate customer list, to send invitations to individuals not within the
19 restricted class to fundraisers without advance payment; the use of meeting rooms that are not
20 customarily available to civic or community organizations; and the provision of catering or other
21 food services without advance payment. See 11 C.F.R. § 114.2(f)(2).

22 **A. Use of VIDA's Customer List**

23 Corporations such as VIDA, which do not have separate segregated funds, are permitted
24 to solicit contributions to be sent directly to candidates, but those solicitations are limited solely

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1 to its restricted class, consisting of its stockholders and executive or administrative personnel,
2 and their families. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(j) and 114.2(f). Moreover,
3 corporate facilitation may result if the corporation uses its list of customers, who are not within
4 the restricted class, to solicit contributions or distribute invitations to fundraisers without
5 advance payment for the fair market value of the list. See 11 C.F.R. § 114.2(f)(2)(i)(C).

6 Thus, when Mr. von Storch, the President of VIDA, emailed a list of 20,000 VIDA
7 customers and friends to distribute the September 26 fundraiser invitation without making an
8 advance payment, VIDA solicited outside of its restricted class and facilitated the making of
9 contributions to OVF. While Mr. von Storch reimbursed VIDA after the complaint was filed,
10 such reimbursement may mitigate but not vitiate a violation.

11 B. Space Rental

12 Corporate facilitation includes “using meeting rooms that are not customarily available to
13 clubs, civic or community organizations or other groups.” 11 C.F.R. § 114.2(f)(2)(i)(D). For
14 example, facilitation would occur if a corporation makes its meeting room available for a
15 candidate’s fundraiser, but not for community or civic groups. See *Explanation and*
16 *Justification, Facilitating the Making of Contributions*, 60 Fed. Reg. 64259, 64264 (Dec. 14,
17 1995). The permissibility of using such rooms when a corporation receives payment is governed
18 by 11 C.F.R. § 114.9(a), (b), or (d). *Id.* Section 114.9(d), which pertains to “use or rental” of
19 corporate facilities, provides that persons may make use of corporate facilities in connection with
20 a federal election so long as they reimburse the corporation “within a commercially reasonable
21 time in the amount of the normal and usual rental charge.” *Id.*

22 In this matter, despite the purported agreement between Mr. von Storch and Mr. Petrillo,
23 VIDA failed to provide an invoice to the DNC until after the filing of the Complaint and 61 days

1 after the fundraising event. In a recent matter, MUR 5998 (John McCain for President), the
2 Commission determined that it was commercially reasonable for a vendor to invoice a committee
3 45 days after a campaign event and 6 days after the complaint had been filed, given that the
4 delay was relatively short and was due to a tax concern that was under review by the vendor.
5 Furthermore, the Commission has determined billing a committee approximately 90 days from
6 the event is commercially reasonable. See, e.g., MUR 6034 (Worth & Company, Inc.). While
7 the reason for the delay in this matter appears to have been an oversight by the parties, it appears
8 that VIDA obtained payment for the space within a commercially reasonable time, given that
9 VIDA billed OVF within 61 days of the event and received payment shortly thereafter.

10 *c. Beverages*

11 Under 11 C.F.R. § 114.2(f)(2)(i)(E), corporate facilitation includes "providing catering or
12 other food services operated or obtained by the corporation or labor organization, unless the
13 corporation or labor organization receives advance payment for the fair market value of the
14 services." Because VIDA did not receive advance payment for the beverages, VIDA appears to
15 have facilitated the making of a contribution.

16 *d. OVF*

17 In their Responses, the joint fundraising participants of OVF, the DNC and OFA largely
18 reiterate the facts and arguments presented in the VIDA Response. Both the DNC and OFA state
19 that Mr. von Storch acted on his own without consultation or knowledge from the DNC or OFA
20 when he mailed the OVF invitation to the VIDA customer list. See OFA Response at 3-4;
21 DNC/OVF Response at 2-3. We have no information suggesting otherwise. Thus, neither the
22 OVF nor DNC "knowingly" accepted a prohibited contribution in violation of 2 U.S.C. § 441b
23 through the use of the customer list.

1 Assuming that the valuation for the space is correct, OVF does not appear to have
2 accepted a prohibited contribution by renting VIDA's space because OVF paid for the space
3 within a commercially reasonable time. With respect to the beverages, OVF appears to have
4 accepted a prohibited contribution given that OVF failed to make an advance payment to VIDA
5 for these expenses in violation 11 C.F.R. § 114.2(f). However, the Commission exercises its
6 prosecutorial discretion and dismisses this allegation as to OVF and the DNC in light of the
7 relatively small amount of money involved and OVF's ultimate payment for the beverages. *See*
8 *Heckler v. Chaney*, 470 U.S. 821 (1985).

9 IV. CONCLUSION

10 Based upon the foregoing information, the Commission exercise its prosecutorial
11 discretion and dismisses the allegation that OVF and the DNC violated 2 U.S.C. § 441b(a). *See*
12 *Heckler v. Chaney*, 470 U.S. 821 (1985).